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Fleischer, and Jacqueline Fleischer

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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

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12 TC RICH, LLC, a California Limited
13 Liability Company, RIFLE FREIGHT,
14 INC., a California corporation,
FLEISCHER CUSTOMS BROKERS, a
15 sole proprietorship, RICHARD G.
FLEISCHER, an individual, and
JACQUELINE FLEISCHER, an
individual,

16 Plaintiffs,

17 v.

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19 PACIFICA CHEMICAL,
INCORPORATED, a California
20 Corporation, AQUA SCIENCE
ENGINEERS, INC., a California
Corporation, A/E WEST
21 CONSULTANTS, INC., a Nevada
Corporation, and DOES 1 through 10,
22 inclusive,

23 Defendants.

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25 Case No. CV 15-4878 DMG (AGRx)

Assigned to the Hon. Dolly M. Gee

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27 **FURTHER JOINT STATUS
REPORT**

28 Action filed: June 26, 2015

Discovery cut-off: None set

Trial date: None set

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29 **AND ALL RELATED CROSS-ACTIONS**

1 This Further Status Report follows the Status Conference call held on October
 2 26th. During that call, the Court ordered (1) a Further Joint Status Report by
 3 November 14th regarding the Facility-Initiated Corrective Action (“FICA”), (2)
 4 status of potential settlement, and (3) quarterly status reports thereafter (with the
 5 first due on February 14, 2019).

6 **FICA**: On November 7th, plaintiffs and their counsel met with the DTSC
 7 representatives. During that meeting, plaintiffs were informed that the DTSC had
 8 sent a draft FICA to defendant Pacifica and its counsel pursuant to which Pacifica
 9 was identified as the sole party responsible for performance of the Removal Action
 10 Workplan (RAW). After tendering a request later that day to Pacifica’s counsel for
 11 a copy of the draft agreement provided to it by DTSC, Pacifica’s counsel provided
 12 that draft FICA to plaintiffs’ counsel, which confirmed that the DTSC’s draft FICA
 13 was sent to Pacifica’s counsel and its environmental consultant (Bret Stone and
 14 Jeremy Squire) on May 4, 2018. Plaintiffs contend that the reason the draft FICA
 15 was sent only to Pacifica is because that draft FICA was a proposed agreement
 16 between the DTSC and Pacifica, the only responsible party identified by the DTSC
 17 at the time. Plaintiffs further contend they were never provided a copy of the draft
 18 FICA by the DTSC because, as explained by the DTSC, they were not a party to the
 19 agreement. Pacifica contends that the draft FICA only included Pacifica and was
 20 only sent to Pacifica because Pacifica has been the only party actively putting its
 21 foot forward to work with DTSC to come to a resolution by preparing the RAW.
 22 Pacifica started with the draft FICA provided by DTSC and made edits it believed
 23 were appropriate to achieve full and final resolution of this litigation and
 24 remediation of the contamination at issue.

25 The edited draft FICA Mr. Stone provided to plaintiffs’ counsel on July 5th,
 26 identified Pacifica AND all plaintiffs as joint responsible parties. Plaintiffs contend
 27 that the DTSC representative informed plaintiffs’ counsel that plaintiffs could elect
 28 to participate in the agreement, but it was not a current requirement of the DTSC,

1 thus the original FICA named only Pacifica.

2 Plaintiffs do not agree that they have any obligation to enter into a FICA with
 3 Pacifica. It's plaintiffs' understanding that because plaintiffs will not agree to
 4 voluntarily become a responsible party, the DTSC will issue an order against
 5 Pacifica to take full responsibility for the clean-up. Pacifica contends that Plaintiff *is*
 6 a responsible party as the current owner of the facility as alleged in its counterclaim
 7 (ECF No. 17). Thus, if DTSC were to issue an order, it would have to identify *all*
 8 responsible parties. Pacifica believes that plaintiffs must also enter into the FICA in
 9 order to facilitate final resolution of this matter and remediation of the
 10 contamination at issue.

11 **SETTLEMENT:** Pacifica's counsel provided a draft settlement agreement on
 12 July 5th that plaintiffs believe does not comport with the understanding reached in
 13 mediation with Magistrate Judge Gandhi on June 7, 2017. The central item
 14 tentatively agreed to in an unsigned "Memorandum of Understanding" was that
 15 Pacifica's insurance carrier, Fireman's Fund, agreed to pay \$940,000 to Murex
 16 Environmental, Pacifica's consultant, and that Murex agreed to complete all
 17 remediation activities for that sum. Plaintiffs believe that under the proposed
 18 settlement terms, plaintiffs would have no responsibility for funding or completing
 19 the remediation of the contamination caused by Pacifica's long-term operations.
 20 Rather, Murex would agree to accept that responsibility in exchange for payment.
 21 While it is correct that additional assessment and related work were contemplated at
 22 the mediation with Judge Gandhi, Murex was certain it could and would complete
 23 all remediation activities for \$940,000. That was guaranteed money to Murex. It
 24 was based on that understanding that Pacifica and its counsel and consultant, Murex,
 25 undertook responsibility to communicate with the DTSC and begin the "complete
 26 remediation" process. Pacifica disagrees with this understanding of the terms in the
 27 Memorandum of Understanding and specifically disagrees that the terms intended
 28 for plaintiffs to have no further responsibility whatsoever for the remediation

1 activities to be performed at their property. Indeed, Pacifica's insurer made it clear
 2 that any final settlement would be of a sum certain and not an agreement to perform
 3 work. Plaintiffs previously accepted two other cash settlements in this case totaling
 4 \$100,000, which this Court determined were in good faith and therefore acts as a
 5 \$100,000 setoff to what plaintiffs could recover from any other parties, including
 6 Pacifica.

7 Pacifica's proposed "settlement agreement" provides that plaintiffs accept an
 8 unknown amount (the agreement contains a "_____ " for the settlement
 9 amount), presumably from Pacifica's carrier, completely release Pacifica, and take
 10 full responsibility for the remediation work. The settlement agreement does not
 11 include Plaintiff-Intervenor, except to state that Pacifica will "send notice" to the
 12 Intervenor. Plaintiffs find the settlement agreement proposed by Pacifica to be
 13 unacceptable and believe the parties are now at an impasse. Pacifica has not
 14 received a redline markup of the settlement from Plaintiffs. Pacifica does not
 15 understand the plaintiffs' objection as they previously reached two settlement
 16 agreements in this case for a sum certain. While Pacifica is willing to return to Judge
 17 Gandhi for further mediation, it does not make sense to do so until the pilot study
 18 portion of the RAW is completed. But without a FICA, DTSC will not approve the
 19 RAW. Plaintiffs risk tens of thousands of dollars of investigation work not being
 20 performed. This work can be performed at no cost to the plaintiffs if they agree to
 21 sign the FICA instead of deciding to litigate.

22 **DTSC:** Plaintiffs expect that the DTSC will issue its order shortly.
 23 Thereafter, it will be up to Pacifica to accept the order, if Pacifica is the only named
 24 responsible party. Pacifica cannot comment on this hypothetical. Plaintiffs may
 25 request that the Court set this matter for trial and all attendant dates and events
 26 leading up to trial. Given the posture of Plaintiff and Defendant, prior to moving
 27 forward with setting trial dates, Plaintiff-Intervenor would request that the parties
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1 take the suggestion of the Court and schedule a follow-up mediation session with
2 either a Magistrate Judge or Mr. Gandhi.

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5 Dated: November 14, 2018

RAINES FELDMAN LLP

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/s/ John S. Cha

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John S. Cha
Counsel for Plaintiffs

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Dated: November 14, 2018

PALADIN LAW GROUP® LLP

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/s/ Bret A. Stone

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15 Dated: November 14, 2018

Bret A. Stone
Counsel for Defendant Pacifica Chemical
Incorporated

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FOLEY & LARDNER LLP

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/s/ Tony Tootell

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Sarah A. Slack
Tony Tootell
Counsel for Plaintiff-Intervenor